

September 3, 2006

VIA email to: IEED@bia.edu

Re: Comments on Draft Report to Congress, Energy Policy Act of 2005, Section 1813, Indian Land Rights-of-Way Study (August 7, 2006)

The Interstate Natural Gas Association of America (INGAA) submits the following comments on the U.S. Department of Energy and U.S. Department of the Interior Draft Report to Congress required by section 1813 of the Energy Policy Act of 2005. INGAA is a national, non-profit trade association that represents the interstate natural gas pipeline industry and whose members account for virtually all of the natural gas transported and sold in the United States.

INGAA commends the agencies for their diligent work to comply with the mandates of section 1813 and appreciates the difficulties posed by the tasks Congress asked of it, especially within the tight timeframes set by the Energy Policy Act of 2005. INGAA is especially pleased that the agencies identified options for companies, tribes, and Congress to consider with respect to standards and procedures for determining fair and appropriate compensation for grants, expansions, and renewals of energy rights-of-way on tribal land.

However, INGAA believes the agencies did not appreciate the need to balance tribal sovereignty, which is not absolute, with the need for economic certainty in the energy transportation industry and that this failure detrimentally impacted the Draft Report's discussion of national energy transportation policies and options. INGAA also is disappointed that the agencies applied inconsistent standards with respect to data supplied by the tribes and data supplied by the energy industry. The agencies failed to use relevant INGAA data and did not appreciate the reasons why many of INGAA's member companies were unable to share information regarding tribal land settlements due to preexisting confidentiality agreements. The agencies also heard from INGAA that a number of its companies would not participate in the study because of concerns that their participation could negatively impact their current and future business relationships with their tribes. The agencies failed to recognize that the companies' reluctance to participate in the study is evidence, in and of itself, of the unlevel playing field between the tribes and the utility companies. As detailed below, INGAA urges the agencies to correct these deficiencies in the Final Report so that Congress has a complete picture of the current situation regarding grants, expansions and renewals of rights-of-way on tribal land.

INGAA believes Congress needs to establish an objective, consistent, transparent, and uniform standard for valuing rights-of-way across tribal lands that is sufficient to ensure the construction, and continued operation of necessary natural gas transportation infrastructure, fair and reasonable natural gas transportation costs, and the payment to tribes of reasonable compensation. While a negotiated agreement for rights-of-way, whether new or existing, is the preferable outcome in all situations, INGAA believes that the study should encourage Congress to authorize a backstop mechanism, when negotiations come to an impasse, that provides the tribes with a fair and just return while providing the interstate natural gas pipeline industry with the ability to deliver needed natural gas to consumers at reasonable costs.

1. The Final Report Should Discuss Limits on Tribal Sovereignty and Identify Congress' Authority to Balance Self-Determination with Energy Security

The draft report repeatedly implies that a tribe's sovereignty over tribal lands is virtually absolute. The draft report states:

A tribe's determination of whether to consent to an energy ROW across its land is an exercise in its sovereignty and an expression of self-determination. The implication of any reduction in the tribe's authority to make that determination is that it would reduce the tribe's authority and control over its land and resources, with a corresponding reduction in sovereignty and abilities for self-determination.

Draft Report, §2.4 at 14. This statement fundamentally misstates the nature of the relationship between tribes and the federal government. This misunderstanding influences the tone of the report and fails to provide Congress with an accurate "assessment of the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy ROWs on tribal land."¹ It also limits the Draft Report's considerations of "relevant national energy transportation policies" for energy rights-of-way on tribal land and the options it identifies.

Neither a tribe's sovereignty, nor the corresponding authority of "self-determination" as granted by Congress, is absolute. The Supreme Court has repeatedly recognized that Congress has "plenary and exclusive authority" over Indian affairs.² Courts have upheld broad congressional authority to impose federal policy directly on tribes without their consent.³

This authority includes Congressional power over real property owned by tribal governments or held in trust by the Department of the Interior for tribes. As noted in Cohen's Handbook on Indian Law, "[t]he United States Congress also has the power to take action in derogation of tribal property interests by granting leases and rights-of-way on Indian lands, as well as disposing of Indian property without consent of Indian owners."⁴ Similarly, a tribe's authority over tribal land is not unlimited. A tribe can grant rights-of-way or other uses of tribal property only with the ratification to the Secretary of the Interior as that power has been delegated to him by Congress. Thus, Congressional authority over Indian affairs, including the use of tribal land, is clearly in this context consistent with the U.S. Constitution's empowerment of Congress to regulate commerce with Indian tribes.⁵

Accordingly, Congress has the power to balance Congressional policies of tribal self-determination with Congressional policies promoting the opportunity of all Americans –

¹ EPA Act §1813(b)(3).

² *United States v. Lara*, 541 U.S. 193, 200 (2004); *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 470 (1979).

³ See Cohen's Handbook of Federal Indian Law §5.02[1], 398-99 (Aug. 2005) for a discussion of the breadth of federal authority over Indian affairs.

⁴ *Id.* at §5.02[4], 402 (citations omitted).

⁵ U.S. Constitution, art. I, § 8.

including Native Americans – to have access to reliable, affordable energy. This power to balance competing policies is never explicitly mentioned in the Draft Report. At best, the Draft Report alludes to this authority and, even then, qualifies the reference by highlighting what it concludes is the paramount need to protect tribal sovereignty and self-determination over all other interests. Again, this fails to provide Congress with useful information as it grapples with these difficult issues.

The incomplete picture presented to Congress is most obvious in chapter 4 of the Draft Report where Congressional options for addressing rights-of-way across tribal lands are detailed. For example, the Draft Report cites Congress' power as explicitly stated in one statute to grant rights-of-way through tribal lands for public uses with just compensation,⁶ and states that “no legislation authorizes the condemnation of Indian tribal lands in specific terms.” Draft Report §4.4.2 at 31. However, the Draft Report fails to note that Congress has the authority to condemn tribal lands or allow others to do so in order to effectuate Congressional energy policies, such as in this instance, the need to reduce reliance on foreign oil and the need for adequate domestic infrastructure. That is, if Congress concludes that the energy security needs of Americans require a backstop, it can legislate such, including transferring its power of eminent domain to energy companies with a demonstrated need to transport energy supplies across tribal lands.

While INGAA appreciates that use of this backstop authority would be a last resort if a negotiated agreement could not be reached, the Final Report needs to discuss Congress' eminent domain authority in greater detail. The Final Report should specifically note that Congress could expand existing condemnation authorities to apply to tribal lands to the same extent they apply to individual Indian allotments and other private, state or municipal land. That is, section 7 of the Natural Gas Act delegates the federal power of eminent domain to natural gas transportation pipeline companies who hold a certificate of public convenience and necessity granted by the Federal Energy Regulatory Commission (FERC) after a FERC determination that the facilities are necessary and in the public interest, where the company and a property owner cannot agree as to compensation.⁷ Congress could extend this authority to clearly include tribal lands, especially as to the siting of new gas pipelines.⁸

⁶ “Nothing in [the Indian General Allotment Act of 1887] contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians . . . for the public use, or to condemn such lands to public uses, upon making just compensation.” 25 U.S.C. §341.

⁷ Section 7 states:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.

A federal backstop authority for the renewals of existing rights-of-way is of greatest necessity. At least with the construction of new pipelines, if a tribe is unwilling to issue a right-of-way for a reasonable compensation, a pipeline company can, if geographically possible, construct around tribal lands. While this will very likely result in increased costs for the company and the consumer, increase resource damage and not provide any economic benefit to a tribe, it may be an option in many situations. Of course, in those instances where the pipeline cannot build new infrastructure around tribal lands, for whatever reason, if the tribes and the pipelines cannot agree on a right-of-way payment, energy infrastructure will not be built where necessary to meet the growing energy needs of America and Congress' national energy policy will be frustrated.

Tribes have even greater bargaining power with regard to renewal of energy rights-of-ways. The so-called "build-around" option will be less available for renewals where pipeline companies already have invested hundreds of millions, if not billions, of dollars on existing infrastructure located on tribal lands. Again, INGAA believes a negotiated settlement is always the preferable outcome in pipeline renewal negotiations but the ability of a tribe to extract significant sums of money (that have no relation to fair market value) from pipeline companies who have already heavily invested on tribal lands cannot be understated. If Congress were to provide a backstop mechanism, there would be an increased incentive for tribes to negotiate energy rights-of-way renewals for terms and conditions that more accurately reflect the current market situations. INGAA notes that in right-of-way renewal situations, tribal concerns as to sovereignty should be significantly lower since the tribe previously allowed construction of the pipeline. The Final Report should clearly state that Congress has the authority to limit what tribes' believe to be an unfettered right to deny a renewal of an existing right-of-way or to extort exorbitant fees for such a renewal.

2. The Final Report Should Specifically Discuss Industry Concerns about Sharing Cost Data, Use More of the Data Received, and Apply the Same Verification Standards to All Data

Congress tasked the agencies with providing in its Report to Congress an "analysis of historic rates of compensation paid for energy rights-of-way on tribal lands." 1813(b)(1). To fulfill this request, the agencies relied on case studies and trade association surveys. As requested, INGAA surveyed its more than two dozen members on: what they paid to acquire and renew tribal rights-of way; if that value was based on third party appraisals or a review of then-current land values; whether the compensation paid to the tribe matched or exceeded this appraisal or land valuation; and their level of satisfaction regarding the negotiation process.

15 U.S.C. § 717f

⁸ As evidenced by its willingness in the Energy Policy Act of 2005 to transfer its eminent domain authority to electricity transmission facilities, Congress clearly realizes the importance of energy transportation facilities to America's energy security. Under these provisions, this authority extends to not only new construction but also the modification of electricity transmission facilities and mandates the payment of fair market value. Energy Policy Act of 2005 §1221.

For a variety of reasons, discussed below, and despite assurances of confidentiality, a number of INGAA's members with rights-of-way across tribal lands could not achieve compliance with the terms of existing confidentiality agreements if they responded to the survey. Other INGAA members responded to the INGAA survey, but their confidentiality agreements precluded them from sharing the underlying easement agreements with the agencies. As a result, the agencies disregarded the data. Unfortunately, the agencies' decision on what industry data to use and not use skews the picture of the current situation and needs to be remedied in the Final Report. Finally, the agencies do not appear to have imposed these verification standards uniformly on all data submitted and, more importantly, cited in the Draft Report. The Final Report needs to impose comparable verification standards on all data it references or note that the data was not verified by the agencies.

a. Final Report Needs to Reflect Confidentiality Concerns

In addition to those pipelines that could not participate in the INGAA survey or verify their data for the agencies due to confidentiality concerns, several INGAA member companies refused to participate in the survey "due to concerns about the impact such participation could have on present or future negotiations with tribes." Draft Report §5.5.2 at 47. The reasons behind these confidentiality concerns shed important light on the current position gas pipeline companies find themselves with respect to rights-of-ways on tribal land. Namely, companies' inability to safely share information with the agencies, despite promises of confidentiality, substantiates what energy transportation industry repeatedly told the agencies in the three public meetings and their comments: tribes have so much leverage when bargaining with natural gas transportation companies about the renewal of existing rights-of-way on tribal land that companies fear retaliation and the extraction of increased compensation for the renewal of other rights-of-way. That is, tribes know that because the pipeline companies have significant infrastructure investments on tribal land, tribes can seek compensation up to the amount of money it would cost the company to build new pipelines around tribal lands – a figure that bears absolutely no relation to any objective valuation standard, like fair market value. Companies fear that if what they paid for rights-of-way becomes public it could have a negative impact on their relationship with their other tribes and that tribes will use this information in other bargaining situations, including renewals for other pipelines on tribal land.⁹ The Final Report should note, in section 1.2 (Scope of Section 1813 in the discussion of the analysis of historic compensation rates) and section 5.3.3 (confidentiality of energy ROW information) this fear and its relevance to the issues confronting Congress including the fact that this is additional evidence of the undue leverage of tribes possess when they negotiate utility rights-of-ways.

b. Final Report Needs to Use More of the Data Industry Supplied

INGAA surveyed its member companies to gather information on negotiation of rights-of-way on tribal lands and compensation practices. INGAA provided the agencies with information not only on renewals but also on the original acquisition of rights-of-way. INGAA also provided the agencies with a 1998 Study commissioned by the INGAA Foundation, Inc. on

⁹ The concern about this information becoming public is so great that one INGAA member company could not release data regarding its right-of-way renewal unless pursuant to a government issued subpoena.

rights-of-way on tribal land.¹⁰ The agencies chose not to use any of the data INGAA gathered with respect to new rights-of-way nor did it use any of INGAA's data with respect to rights-of-way renewals that occurred more than five years ago, which would have shown an increase in rights-of-way fees over time that is not attributable to an increase in property values. Further, the agencies also did not use any of the information provided in the 1998 Study, which information was consistent with the conclusions INGAA reached in its more recent survey, thus providing further evidence of the credibility of its findings. Further, both studies show that this is an industry-wide problem and that utility companies are experiencing increasing difficulty when they attempt to negotiate rights-of-way over tribal land. In order to provide Congress with the information requested regarding historical rates of compensation for rights-of-way, the Final Report needs to recognize the significance of this data and incorporate this data into its findings.

The Draft Report also omitted any information that it was unable to verify through a review of the actual easement documents and consequently disregarded survey results on a number of rights-of-ways. The Draft Report states that “[i]nformation was not available . . . to fully confirm INGAA's findings that tribes generally began negotiations by requesting terms of less than 20 years and that few respondents were satisfied with the negotiations.” This statement implies that INGAA did not have this information to support these statements. To the contrary, INGAA specifically surveyed its members on this point and provided the survey results to the agencies. The INGAA survey showed that the terms of rights-of-ways are shortening over time and, consequently, pipelines have less certainty on both the term of the easement and the price than they had in the past. However, the agencies required that this information be found in documents authorizing the renewal of the rights-of-way (the only documents the agencies reviewed). Further, the level of satisfaction with the negotiation process cannot be found in right-of-way documents in any event. Rather, it can only be determined through a survey which sought the information, which the agencies chose to disregard, or through conversations with the negotiating parties. Because of the importance of this information, it should be included in the Final Report.

Nonetheless, the agencies were able to confirm certain of the data that was provided by INGAA.¹¹ Draft Report §5.5.2 at 48. This data shows that natural gas pipeline companies are paying compensation for rights-of-way renewals across tribal lands in excess of fair market value in addition to the other kinds of compensation to the tribes (such as scholarships); the average term for a right-of-way (either new or renewal in the last five years) was 20 years; and rights-of-way renewal negotiations can take up to 10 years. Draft Report §5.5.2 at 48. The Final Report needs to note these verified statements in chapter 1 and not bury them at the end of the report.

¹⁰Comments of Interstate Natural Gas Association of America (May 15, 2006).

¹¹ The Draft Report states that “[a]t INGAA's request, an independent assessment of its use of survey data was conducted.” Draft Report §5.5.2 at 47. That statement is inaccurate. The agencies requested to review the data gathered by INGAA and INGAA agreed.

c. Final Report Needs to Hold Tribal Data to the Same Verification Standards as Industry Data

At the agencies' request, INGAA allowed the data it gathered from member companies to be reviewed. The Draft Report states that the agencies were able to verify data INGAA provided for case studies. Draft Report §5.5.2 at 48-49. INGAA appreciates the agencies' desire to verify the data it submits in order to ensure that it is providing Congress accurate information. However, outside of chapter 5, there are many other places in the Draft Report where the agencies use data supplied by the tribes which was of the same character as the information supplied by INGAA but which was disregarded by the agencies due to verification concerns.¹² The Final Report needs to either verify this information or explicitly note that the data has not been verified.

This failure to uniformly verify data is most troubling with respect to the Draft Report's handling of cost information. In section 4.3 of the Draft Report, the agencies discount and disparage (and, as discussed above, ignore) much of the information industry supplied with respect to the long-term impact rights-of-way issues on tribal land could have on energy supply and costs to consumers. This information will be critical to Congress' analysis of these issues.

Similarly, in chapter 1.3.7, the Draft Report discusses three studies commissioned by tribes to measure the consumer cost of energy rights-of-way fees across tribal lands. The agencies do not appear to have made any effort to verify the data or conclusions of these studies. As it did with the data and conclusions submitted by EEI and INGAA, the Final Report should verify the data and conclusions submitted by the tribes with respect to consumer costs before the information is included.

In conclusion, INGAA appreciates the opportunity to comment on the draft 1813 study. For the reasons explained above, INGAA recommends the Final Report balance tribal sovereignty, which is not absolute, with the need for economic certainty in the energy transportation industry. INGAA also urges the agencies to address any data deficiencies in the Final Report so that Congress has a complete picture of the current situation regarding grants, expansions and renewals of rights-of-way on tribal land.

¹² For example, in section 1.3.3., the report notes that "[o]ne tribe observes that negotiations took from six months to eight years, but that most of the time, the parties worked in good faith to resolve their differences." There is no citation to confirm verification. By comparison, negotiation time as reported by industry is not mentioned until discussion of the case studies in chapter 5. If the agencies were willing to accept statements by the tribes, based on oral or written comments, without verification from source documents, the agencies should have used what industry stated in the three public conferences and comments as evidence as well.

Respectfully submitted,

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